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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 \* \* \*

7 JASON K. SIMPSON,

8 Plaintiff(s),

Case No. 2:16-CV-2981 JCM (VCF)

ORDER

9 v.

10 S. DEVORE, et al.,

11 Defendant(s).  
12

13 Presently before the court is defendants Thomas Faller, Daniel Hawkins, Brendan LeBlanc,  
14 Craig Lilienthal, Troy Radke, Lawrence Rinette, Timothy Schoening, Theodore Snodgrass, Linda  
15 Theobald, and Prokopios Ziros's motion to dismiss. (ECF No. 16). Plaintiff Jason Simpson filed  
16 a response (ECF No. 23), to which defendants replied (ECF No. 27).

17 Also before the court is plaintiff's motion for judgment on the pleadings. (ECF No. 24).  
18 Defendants filed a response. (ECF No. 30). Plaintiff has not replied, and the time for doing so  
19 has since passed.

20 Also before the court is plaintiff's motion for summary judgment. (ECF No. 25).  
21 Defendants filed a response, (ECF No. 31), to which plaintiff replied (ECF No. 45).

22 Also before the court is plaintiff's motion to extend time to respond to defendants' motion  
23 to dismiss. (ECF No. 26). Defendants filed a response. (ECF No. 28). Plaintiff has not filed a  
24 reply, and the time for doing so has since passed.

25 Also before the court is plaintiff's motion to amend his complaint. (ECF No. 46).  
26 Defendants filed a response, (ECF No. 47), to which plaintiff replied (ECF No. 52).  
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1 Also before the court is plaintiff's motion "asking the court to put a hold on anything asked  
2 of plaintiff by defendants until counsel can be appointed." (ECF No. 55). Defendants filed a  
3 response. (ECF No. 60). Plaintiff has not filed a reply, and the time for doing so has since passed.

4 Also before the court is plaintiff's motion "requesting a summary of everything filed in the  
5 matter be sent to plaintiff." (ECF No. 58). Defendants filed a response. (ECF No. 63). Plaintiff  
6 has not filed a reply, and the time for doing so has since passed.

7 Also before the court is plaintiff's motion "requesting the court to provide plaintiff with an  
8 expert and rebuttal expert or fees to hire one." (ECF No. 59). Defendants filed a response. (ECF  
9 No. 62). Plaintiff has not filed a reply, and the time for doing so has since passed.

10 Also before the court is plaintiff's motion "to remove S. Devore's name from this litigation  
11 since he is not a defendant." (ECF No. 65). Defendants have not filed a response, and the time  
12 for doing so has since passed.

### 13 **I. Background**

14 In the instant case, plaintiff seeks to hold defendant police officers liable for conduct related  
15 to a May 25, 2016 arrest of plaintiff. The following factual recitation comes from plaintiff's  
16 complaint.

17 On May 25, 2016, plaintiff and his girlfriend visited Sun Coast Casino. *Id.* That day,  
18 plaintiff was driving a Mercedes that he did not own.<sup>1</sup> *Id.* While attempting to leave Sun Coast,  
19 unmarked vehicles attempted to surround the car driven by plaintiff. *Id.* When plaintiff attempted  
20 to change directions, one of the vehicles collided with the car driven by plaintiff. *Id.* The other  
21 vehicles immediately surrounded the car. *Id.* The unmarked vehicles were police vehicles. *Id.*

22 One of the defendants<sup>2</sup> shattered the windows of the Mercedes with the butt end of a  
23 shotgun and pulled plaintiff's girlfriend through the window by grabbing onto her head. *Id.*  
24 Defendant Ziros then pulled plaintiff through a shattered window, with shards of glass cutting into  
25 plaintiff's body as Ziros removed him from the car. *Id.* Plaintiff was thrown to the ground on his

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27 <sup>1</sup> Plaintiff alleges the car belonged to another person. Neither the complaint nor any other  
28 filings in this case clarify who owned the car or why plaintiff was driving it that day.

<sup>2</sup> The complaint does not state which defendant shattered the windows of the Mercedes.

1 stomach and handcuffed. *Id.* Multiple defendants proceeded to punch and kick plaintiff's groin,  
2 ribs, thighs, face, and the back of his head. *Id.* Defendant Theobold yelled "camera," at which  
3 point defendants stopped punching and kicking plaintiff. *Id.*

4 Defendant Snodgrass was responsible for impounding the vehicle. *Id.* Snodgrass left a file  
5 containing an application for a search warrant and corresponding affidavit in the back of the  
6 vehicle. The documents contained plaintiff's personal information, including his social security  
7 number, date of birth, and details of an ongoing criminal case. *Id.* When the vehicle was returned  
8 to its owner, the owner "[r]ead [the file] and put a contract on [plaintiff's] life." *Id.*

9 Plaintiff filed the instant complaint on December 22, 2016. (ECF Nos. 1, 4). The  
10 complaint contains three causes of action: (1) a cruel and unusual punishment claim under the  
11 Eighth Amendment, (2) a "false testimony due process and or right to privacy" claim under the  
12 Fourth Amendment; and (3) an unlawful use of force claim under the Fourth Amendment. (ECF  
13 No. 4).

## 14 **II. Legal Standard**

### 15 *a. Failure to state a claim*

16 A court may dismiss a complaint for "failure to state a claim upon which relief can be  
17 granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain  
18 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*  
19 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
20 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the  
21 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

22 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550  
23 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
24 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. 662, 678 (citation  
25 omitted).

26 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
27 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
28 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.

1 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory  
2 statements, do not suffice. *Id.* at 678.

3 Second, the court must consider whether the factual allegations in the complaint allege a  
4 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint  
5 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the  
6 alleged misconduct. *Id.* at 678.

7 Where the complaint does not permit the court to infer more than the mere possibility of  
8 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*  
9 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line  
10 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

11 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
12 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

13 First, to be entitled to the presumption of truth, allegations in a complaint or  
14 counterclaim may not simply recite the elements of a cause of action, but must  
15 contain sufficient allegations of underlying facts to give fair notice and to enable  
16 the opposing party to defend itself effectively. Second, the factual allegations that  
are taken as true must plausibly suggest an entitlement to relief, such that it is not  
unfair to require the opposing party to be subjected to the expense of discovery and  
continued litigation.

17 *Id.*

18 *b. Summary judgment*

19 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
20 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
21 show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
22 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
23 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
24 323–24 (1986).

25 For purposes of summary judgment, disputed factual issues should be construed in favor  
26 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be  
27 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts  
28 showing that there is a genuine issue for trial.” *Id.*

1 In determining summary judgment, a court applies a burden-shifting analysis. The moving  
2 party must first satisfy its initial burden. “When the party moving for summary judgment would  
3 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
4 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has  
5 the initial burden of establishing the absence of a genuine issue of fact on each issue material to  
6 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)  
7 (citations omitted).

8 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
9 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
10 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed  
11 to make a showing sufficient to establish an element essential to that party’s case on which that  
12 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
13 party fails to meet its initial burden, summary judgment must be denied and the court need not  
14 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
15 60 (1970).

16 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
17 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
18 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
19 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
20 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
21 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
22 631 (9th Cir. 1987).

23 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
24 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
25 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
26 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
27 for trial. *See Celotex*, 477 U.S. at 324.

1 At summary judgment, a court's function is not to weigh the evidence and determine the  
2 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
3 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all  
4 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the  
5 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
6 granted. *See id.* at 249–50.

7 *c. Judgment on the pleadings*

8 "[J]udgment on the pleadings is proper 'when, taking all the allegations in the non-moving  
9 party's pleadings as true, the moving party is entitled to judgment as a matter of law.'" *Ventress*  
10 *v. Japan Airlines*, 486 F.3d 1111, 1114 (9th Cir. 2007) (citation omitted). The allegations of the  
11 nonmoving party must be accepted as true while any allegations made by the moving party that  
12 have been denied or contradicted are assumed to be false. *MacDonald v. Grace Church Seattle*,  
13 457 F.3d 1079, 1081 (9th Cir. 2006).

14 **III. Discussion**

15 *a. Motion to dismiss*

16 Defendants move to dismiss plaintiff's first claim of relief for failure to state a claim. (ECF  
17 No. 16). Defendants further move to dismiss all causes of action against defendants in their official  
18 capacities. *Id.*

19 As an initial matter, the court will grant plaintiff's motion to extend time to file a response  
20 to defendants' motion for summary judgment. (ECF No. 26). Plaintiff, a prisoner at High Desert  
21 State Prison, demonstrates in his motion that his failure to file a timely response was due to  
22 excusable neglect. As public policy favors disposition of motions on the merits, *see Ghazali v.*  
23 *Moran*, 46 F.3d 52, 53 (9th Cir. 1995) ("public policy favor[s] disposition of cases on their  
24 merits . . ."), the court will grant plaintiff's motion.

25 Plaintiff's first and third claims in his complaint relate to excessive force under the Eighth  
26 and Fourth Amendments of the U.S. Constitution. (ECF No. 4). Eighth Amendment protections  
27 do not attach until after a conviction and sentence. *Graham v. Connor*, 490 US. 386, 392 n.6  
28 (1989); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). Plaintiff's excessive force claims

1 relate to pre-indictment conduct. (ECF No. 4). Accordingly, his complaint fails to state a claim  
2 under the Eighth Amendment. *See Ingraham*, 430 U.S. at 671 n.40. The court will dismiss  
3 plaintiff's first cause of action.

4 Plaintiff's complaint sues defendants in both their individual capacities and in their official  
5 capacities as employees of the LVMPD. (ECF No. 4). Defendants assert that plaintiff's official  
6 capacity claims against them should be dismissed. (ECF No. 16).

7 Here, plaintiff's complaint lists the Las Vegas Metropolitan Police Department  
8 ("LVMPD") in the caption. However, the complaint does not list the LVMPD in its jurisdictional  
9 statement, its list of defendants, or in any of the causes of action. *Id.* The clerk's office has not  
10 listed the LVMPD as a party to the action, and did not issue a summons to LVMPD. *See* (ECF  
11 No. 11). Therefore, as the complaint properly names defendants in their official capacities, and  
12 the LVMPD is not currently a party to this action, the court will deny defendants' motion to dismiss  
13 plaintiff's causes of action against defendants in their official capacities without prejudice.

14 *b. Motion for judgment on the pleadings/summary judgment*

15 Plaintiff filed the same document three times. The documents are all titled "Plaintiff's  
16 Opposition to Defendant(s) Motion to Dismiss, Motion for Judgment on the Pleadings and Motion  
17 for Summary Judgment." (ECF Nos. 24, 25, 26).

18 At this stage in the proceedings, it is not the court's role to sit as the finder of fact, but  
19 rather to determine whether there are genuine issues of fact precluding judgment as a matter of  
20 law. *See Anderson*, 477 U.S. at 249. Plaintiff's allegations detail horrendous acts allegedly  
21 performed by defendants. However, plaintiff has not offered evidence, much less undisputed  
22 evidence, that all of his factual allegations are true. As defendants' responses to plaintiff's motions  
23 note, defendants contest many of the factual assertions in plaintiff's complaint. Plaintiff has not  
24 established that he is entitled to judgment as a matter of law. *See C.A.R. Transp. Brokerage Co.*,  
25 213 F.3d at 480. The court will deny plaintiff's motions for judgment on the pleadings and  
26 summary judgment.

27 . . .  
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1           c. *Motion to amend*

2           Plaintiff filed a motion to amend his complaint. (ECF No. 46). The motion does not  
3 contain an amended complaint, but instead attempts to add new requests for relief to plaintiff's  
4 original complaint. *Id.* As defendants note, a motion to amend must contain a proposed amended  
5 complaint that is complete within itself, and failure to file a proposed amended complaint is  
6 grounds to deny a motion for leave to amend. *See* LR 15-1.

7           Further, in this instance amendment would be futile. Plaintiff requests the court add  
8 additional relief which includes requests for monetary damages, to "dismiss and or vacate" state  
9 criminal proceedings against plaintiff, and for a court order terminating the employment of  
10 defendants as police officers with the LVMPD. *Id.* Plaintiff's motion does not cite any factual or  
11 legal basis for his requested monetary damages,<sup>3</sup> and the court cannot grant plaintiff the injunctive  
12 relief he requests in this case.

13           The court will deny plaintiff's motion to amend.

14           d. *Motion "asking the court to put a hold on anything asked of plaintiff by defendants until*  
15 *counsel can be appointed"*

16           Plaintiff filed a motion pro se that the court will construe as a conditional motion to stay.  
17 (ECF No. 55); *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be  
18 liberally construed . . ."). Plaintiff requests that the court stay the case until counsel can be  
19 appointed for plaintiff.

20           Magistrate Judge Ferenbach granted plaintiff's initial motion for appointment of counsel,  
21 and referred his request for counsel to the pro bono program. (ECF No. 32). After three months,  
22 no counsel expressed interest in taking plaintiff's case on a pro bono basis. (ECF No. 51).  
23 Magistrate Judge Ferenbach removed plaintiff's case from the pro bono program. *Id.*

24           Thereafter, plaintiff filed a second motion to appoint counsel, or, in the alternative, fees to  
25 hire counsel. (ECF No. 56). Magistrate Judge Ferenbach denied plaintiff's second motion,  
26 "remind[ing] Plaintiff that pro bono counsel are volunteer lawyers who provide their time and  
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28           <sup>3</sup> Plaintiff's motion requests monetary damages of \$100,000.00 against each defendant,  
except Snodgrass, for counts one and three, and \$1,000,000.00 against Snodgrass for count two.



1 resources for those unable to afford an attorney. . . . It is not mandatory for volunteer counsel to  
2 take on cases that are referred to the pro bono program.” (ECF No. 64).

3 As plaintiff’s case has been removed from the pro bono program due to lack of interest,  
4 and plaintiff has expressed an inability to otherwise obtain counsel, he must proceed pro se if he  
5 wishes to continue litigating this action. Accordingly, the court will deny plaintiff’s motion to stay  
6 the case until counsel can be appointed for plaintiff.

7 *e. Motion “requesting a summary of everything filed in the matter be sent to plaintiff”*

8 Plaintiff filed a motion requesting the court send him a summary of everything filed in the  
9 matter. (ECF No. 58).

10 As defendants note, plaintiff’s request in effect asks for legal assistance from the court.  
11 Plaintiff does not cite any case law or statute to support his request. The court cannot summarize  
12 the case for plaintiff, and will deny plaintiff’s motion insofar as it requests a summary of the case.

13 Defendants note that plaintiff’s motion is unclear as to its requested relief. (ECF No. 63).  
14 To the extent that plaintiff requests access to the court’s online docket, defendants note that they  
15 do not oppose such a request.

16 *f. Motion “requesting the court to provide plaintiff with an expert and rebuttal expert or*  
17 *fees to hire one”*

18 Plaintiff filed a motion “requesting the court to provide plaintiff with an expert and rebuttal  
19 expert.” (ECF No. 59). In the alternative, plaintiff requests fees to hire experts himself. *Id.*

20 28 U.S.C. § 1915 is the statute authorizing waiver of prepayment of fees for litigants  
21 proceeding in forma pauperis. “The plain language of section 1915 does not provide for the  
22 appointment of expert witnesses to aid an indigent litigant.” *Pedraza v. Jones*, 71 F.3d 194, 196  
23 (5th Cir. 1995); *accord Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987). “The plaintiff  
24 must bear the costs of litigation, including expert expenses, even in pro se cases.” *Pearson v.*  
25 *Pasha*, No. CV 10-00035-H-DWM-RKS, 2011 WL 13136529, at \*1 (D. Mont. Mar. 22, 2011).

26 Plaintiff cites no case law or statute that would authorize the court to hire or pay for experts  
27 on plaintiff’s behalf. The court will deny plaintiff’s motion.

28 . . .

1           g. *Defendant Devore*

2           Plaintiff filed a motion to remove S. Devore's name from this litigation. (ECF No. 65).  
3           Plaintiff alleges that Devore is not a defendant in the case. *Id.* Plaintiff's complaint names S.  
4           Devore as a defendant. (ECF No. 4). However, when the marshals service attempted to serve "S.  
5           Devore," they were unable to locate him. (ECF No. 13). The remarks on the summons page read  
6           "No such person; S. Devore #441." *Id.* As S. Devore was never served, and plaintiff represents a  
7           desire to remove Devore from the action, the court will dismiss plaintiff's claims against defendant  
8           Devore pursuant to Federal Rule of Civil Procedure 41.

9           **IV. Conclusion**

10           Accordingly,

11           IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to  
12           dismiss (ECF No. 16) be, and the same hereby is, GRANTED in part and DENIED in part,  
13           consistent with the foregoing.

14           IT IS FURTHER ORDERED that plaintiff's motion for judgment on the pleadings (ECF  
15           No. 24) be, and the same hereby is, DENIED.

16           IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (ECF No. 25)  
17           be, and the same hereby is, DENIED.

18           IT IS FURTHER ORDERED that plaintiff's motion to extend time to file a response to  
19           defendant's motion to dismiss (ECF No. 26) be, and the same hereby is, GRANTED.

20           IT IS FURTHER ORDERED that plaintiff's motion to amend his complaint (ECF No. 46)  
21           be, and the same hereby is, DENIED.

22           IT IS FURTHER ORDERED that plaintiff's motion "asking the court to put a hold on  
23           anything asked of plaintiff by defendants until counsel can be appointed" (ECF No. 55) be, and  
24           the same hereby is, DENIED.

25           IT IS FURTHER ORDERED that plaintiff's motion "requesting a summary of everything  
26           filed in the matter be sent to plaintiff" (ECF No. 58) be, and the same hereby is, DENIED.

1 IT IS FURTHER ORDERED that plaintiff's motion "requesting the court to provide  
2 plaintiff with an expert and rebuttal expert or fees to hire one" (ECF No. 59) be, and the same  
3 hereby is, DENIED.

4 IT IS FURTHER ORDERED that plaintiff's motion "to remove S. Devore's name from  
5 this litigation since he is not a defendant" (ECF No. 65) be, and the same hereby is, GRANTED.  
6 Plaintiff's claims against defendant Devore are hereby DISMISSED WITHOUT PREJUDICE.

7 DATED February 27, 2018.

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9 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE